Public Prosecutor v Sim Lee Kun

HIGH COURT (SIBU) — CRIMINAL APPEAL NO 50 OF 1994
STEVE SHIM J
15 JULY 1995

Criminal Procedure *— Discharge not amounting to acquittal — Whether fresh charge under fresh criminal summons should be regarded as part of a continuing process arising from the first summons — Trade Description Act 1972 s 11(3)*

The accused was charged with an offence under s 11(3) of the Trade Description Act 1972 under the first summons. The hearing was fixed on 10 December 1991 but the prosecution was unable to proceed and the magistrate ordered that the accused be discharged, the discharge not amounting to an acquittal. Subsequently, the prosecution preferred a fresh charge against the accused under a fresh second summons. The magistrate dismissed the second summons by holding that the time limit required to prosecute the accused in the second summons had lapsed under s 19 of the Trade Description Act 1972. The public prosecutor appealed, arguing that the second summons should be regarded as part of a continuing process arising from the first summons, notwithstanding the fact that the second summons was filed and registered after the expiration of the three-year limitation period and consequent upon the order of discharge not amounting to acquittal.

Held, dismissing the appeal:

(1) The effect of the order of discharge not amounting to acquittal would put an end to the prosecution arising from the first summons although there was still a discretion given to the prosecution to file a fresh charge which might be on similar facts.

(2) Where the prosecution had decided to file a fresh charge under a fresh criminal summons, it had to be regarded as having commenced from the date of the said summons containing the fresh charge. The prosecution under the second summons was instituted more than three years after the commission of the offence and time had lapsed.

[Bahasa Malaysia summary

Si tertuduh telah dituduh dengan satu kesalahan di bawah s 11(3) Akta Perihal Dagangan 1972 di bawah saman yang pertama. Pembicaraan telah ditetapkan pada 10 Disember 1991 tetapi pihak pendakwaan tidak bersedia dan majistret telah memerintahkan si tertuduh dilepaskan, pelepasan itu tidak berjumlah kepada pembebasan. Kemudiannya, pendakwaan mengemukakan

A pertuduhan yang baru terhadap si tertuduh di bawah saman kedua yang baru. Majistret menolak saman yang kedua kerana had masa untuk mendakwa si tertuduh di dalam saman kedua itu telah luput di bawah s 19 Akta Perihal Dagangan 1972. Pendakwa raya merayu, dihujah bahawa saman kedua itu patut dianggap sebagai sebahagian daripada proses berterusan yang timbul dari saman pertama, tidak kira hakikat yang saman kedua telah difailkan dan didaftarkan selepas luputnya had masa tiga tahun itu, dan akibat perintah pelepasan yang tidak berjumlah kepada pembebasan.

Diputuskan, menolak rayuan itu:

C (1) Kesan perintah pelepasan yang tidak berjumlah kepada pembebasan adalah menamatkan pendakwaan yang timbul dari saman pertama walaupun masih terdapat budi bicara yang diberikan kepada pihak pendakwaan untuk memfailkan pertuduhan yang baru yang berasaskan fakta yang sama.

D (2) Di mana pihak pendakwaan telah membuat keputusan untuk memfailkan pertuduhan yang baru di bawah satu saman jenayah yang baru, ianya mesti di anggap sebagai bermula dari tarikh saman yang mengandungi pertuduhan baru itu. Pendakwaan di bawah saman kedua itu telah dimulakan lebih daripada tiga tahun selepas kesalahan itu dilakukan dan had masa telah E luput.]

Notes

For cases on discharge not amounting to acquittal, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 85–87.

F

Cases referred to

Looi Meng Leong v PP [1991] 1 CLJ 355 (folld)
PP v Oh Teck Soon [1986] 1 MLJ 488 (folld)

G **Legislation referred to**

Copyright Act 1987 s 15(4)(b)
Trade Description Act 1972 ss 11(3), 18(1), 19

Nik Suhaimi bin Nik Sulaiman (Deputy Public Prosecutor) for the H appellant.
George Lim (*Battenberg & Talma*) for the respondent.

Steve Shim J: The factual background leading to this appeal by the public prosecutor has first to be laid out. In the magistrate's court, the accused (respondent) was initially charged on 17 May 1989 vide criminal I summons MSC/8/89/A dated 3 May 1989 (hereinafter referred to as 'the first summons'). The accused was charged with an offence under s 11(3) of the Trade Description Act 1972, punishable under s 18(1) thereof. There were a number of adjournments but hearing was finally

fixed on 10 December 1991. However, on the date in question, as the prosecution was unable to proceed due apparently to the unavailability of certain witnesses, the learned magistrate ordered that the accused be discharged not amounting to acquittal. Subsequently, the prosecution preferred a fresh charge vide criminal summons no A/SJB/24/92 dated 30 November 1992 (hereinafter referred to as 'the second summons') against the accused, presumably based on the same facts as the charge under the first summons. As a result, Mr George Lim for the accused raised a preliminary objection questioning the jurisdiction of the magistrate's court in hearing the charge under the second summons. After hearing submissions on both sides on the issue, the learned magistrate sustained the objection and accordingly dismissed the second summons. Against that decision, the public prosecutor has now appealed to this court.

In this appeal, the learned DPP has, in effect, propagated only one ground, namely, that the learned magistrate had erred in law in holding that the time limit required to prosecute the respondent in the second summons had lapsed under s 19 of the Trade Description Act 1972, thereby misdirecting herself and this had occasioned a failure of justice. In this connection, the learned deputy has contended, in essence, that when the first summons was registered on 15 February 1989, it had complied with the limitation period in s 19 and that the subsequent second summons should be regarded as part of a continuing process arising from the first summons, notwithstanding the fact that the second summons was filed and registered after the expiration of the three-year limitation period and consequent upon the order of discharge not amounting to acquittal made by the magistrate's court in respect of the first summons.

I think the situation in our case is rather similar to that in *PP v Oh Teck Soon* [1986] 1 MLJ 488 where the brief facts are as follows: that the accused was initially charged in the magistrate's court for offences under the Copyright Act; that after a number of postponements, the accused was discharged not amounting to acquittal; that subsequently, he was rearrested and brought before the magistrate's court where the same charges were preferred against him; that as a result, a preliminary point was raised that the prosecution was out of time. There, the learned magistrate held the view that the second prosecution was a continuation of the first one and as such, it was not caught by the six-month limitation under s 15(4) of the Copyright Act 1969 and he therefore overruled the objection. The accused appealed to the High Court. The appeal was allowed. The public prosecutor, uncertain about the decision of the High Court, took the matter further to the Supreme Court by referring the following question of law for its consideration:

> Whether by virtue of s 15(4) of the Copyright Act 1969, the prosecution is barred by law from instituting a criminal charge against any person under s 15 six months after the seizure of the video tapes, the subject matter of the charge.

In dealing with the above question, the Supreme Court confined itself essentially, if not solely, to the interpretation or construction placed by the High Court on s 15(4)(b) of the Copyright Act 1969 contained in the following passage of the judgment therein:

> In my view the intention of the legislature in enacting s 15(4)(b) of the Copyright Act 1969 is that after the infringing copies are seized by the police under a search warrant issued by a magistrate proceeding for any offence under s 15(1) must be instituted within six months of the seizure. If no proceedings are instituted within the six months the copies have to be returned to the person from whom they were seized or be dealt with in accordance with the provisioning of s 15(4) of the Copyright Act.

It would appear that the Supreme Court did not agree with the construction placed by the High Court. It was of the view that the central subject of s 15(4) of the Copyright Act 1969 was the return or disposal of the infringing copies or contrivance seized under that provision and that it would be wrong to construe that subsection as a provision laying down a timetable for prosecution. This was reflected in that part of the judgment of Hashim Yeop A Sani SCJ (as he then was) which read:

> A careful reading of s 15(4) will show that the provision deals with the central question of disposal of contrivance or infringing copies and not with prosecution. It is clear from the provision that where after a prosecution no order is made by the court on the infringing copy or contrivance, the copy or contrivance shall be returned to the person from whom it was seized. If this is not practicable, the copy or contrivance should be disposed of in accordance with the law regulating the disposal of lost or unclaimed property in the hands of police authorities — paragraph (a) of s 15(4). Where, however, no prosecution is instituted within six months of the seizure of the copy or contrivance, the copy or contrivance shall also be returned or disposed of in the same manner as set out earlier — paragraph (b) of s 15(4).

Now, it should be noted that although the Supreme Court did not consider it important for the purpose of determining the proper construction of s 15(4) to construe whether the second prosecution in that case was a continuation of the first prosecution, that issue was apparently raised by the disputing parties in the High Court below. And Ajaib Singh J (as he then was) in dealing with it stated thus:

> The second prosecution in this case cannot be a continuation of the first one. The proceedings which were instituted within six months of the seizure of the tapes terminated on 14 September 1982 when the accused was discharged. Those proceedings were thereafter dead and gone to all intents and purposes. The order of discharge of the accused by itself was no bar to the institution of further proceedings against the accused but any further proceedings had to be instituted within six months of the seizure of the tapes and these six months had already lapsed when the accused was arrested the second time. And as the second proceedings were not instituted within the aforesaid six months the magistrate's court had no jurisdiction to take cognizance of the offences with which the accused was charged on this second occasion.

In the instant case, the issue of continuation in circumstances quite similar to those in *Oh Teck Soon* had been canvassed before me. The learned deputy has submitted, in effect, that as the second summons was considered part of a continuing process arising from the first summons, it had therefore complied with the limitation period prescribed in s 19 of the Act and hence the prosecution which commenced vide the second summons was legally proper. Here, I think it is important to understand the effect of the order of discharge not amounting to acquittal made by the magistrate's court in respect of the first summons. The effect of the said order would, in my view, quite simply put an end to the prosecution arising from the first summons, although of course there was still a discretion given to the prosecution to file a fresh charge which might be on similar facts, in which case a new criminal summons would have to be filed and registered accordingly. As Peh Swee Chin J (as he then was) said in *Looi Meng Leong v PP* [1991] 1 CLJ 355:

> I therefore made the order of setting aside the said order of acquittal and discharge and substituting therefore an order of discharge not amounting to acquittal on the grounds as stated, *leaving it to the discretion of the prosecution to start afresh if it really so wished.* (Emphasis added.)

Quite clearly therefore, where the prosecution decided to file a fresh charge under a fresh criminal summons, it must be regarded as having commenced from the date of the said criminal summons containing the fresh charge. It follows that in the present case where the second summons was registered on 30 November 1992, prosecution thereof would have commenced afresh as on the date in question. As the prosecution under the second summons was instituted more than three years after the commission of the offence, it was therefore caught by s 19 of the Act. It had lapsed and hence the magistrate's court could not take cognizance of it. The learned magistrate had therefore not erred in dismissing it.

For the reasons given, I will dismiss this appeal.

Appeal dismissed.

Reported by Timon Shum